United States Court of Appeals

for the Second Circuit

REPLY BRIEF

74-2069

B

P/S

To be argued by
JAMES B. ZANE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-2069

LAWRENCE WALSH and LORETTA WALSH,
Plaintiffs-Appellants,

—against—

THE CITY OF LONG BEACH, ARTHUR ZIMMERMAN, DAVID LINDEN, AL SMITH and GEORGE TRIPANI,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

(Bruchhausen, *J.*)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

ZANE and ZANE
Attorneys for Plaintiffs-Appellants
Office and P.O. Address
One Rockefeller Plaza
New York 10020
(212) 245-2222

JAMES B. ZANE
MARTIN E. FIEL
Of Counsel.

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BRIEF FOR PLAINTIFFS-APPELLANTS

PRELIMINARY STATEMENT

Despite the Appellee's distorted account of the facts or would be facts of this case, there permeates several under currents which more properly should be brought out at trial.

The Appellants do not and this Court should not dwell on what Justice Bruchhausen might have done or would have done, but must be constrained on only what the Honorable Judge has done. The statements made by Respondent, that "had [Justice Bruchhausen] reached his conclusion on those grounds, he would certainly have..." is an attempt at prophesy, and no more. This Court is only reviewing what has been done, and only that which has been considered by the District Court in rendering its Decision is here subject to review. The Appellees insistance upon raising new matter for this Court's consideration is only too clearly exemplified by the inclusion as Exhibits to its Brief many items not presented for consideration by the lower Court.

Appellants also find incredible Appellees' statement on page 6 of its Brief reciting that:

> "...Plaintiff succeeded in obtaining in one day from that same Building Commissioner by devious means, a three-family Certificate of Occupancy ...,

unquestionably illegal and improper..."

On the issue of legality and propriety in the issuance of this three-family Certificate of Occupancy, this Court is respectfully referred to the Examination Before Trial of David Linden, held on February 22, 1973, beginning at page 17, where Mr. Linden was asked the following questions:

> Question: Mr. Linden, during the time of your tenure during the period that Mr. Kolkin was the owner of the premises, did any official of the City of Long Beach, elected or appointed, ever request you to take no action for the violation in the subject premises as a favor to the individual? [line 23, page 17 through line 4, page 18].
>
> Question: During the period of time which Mr. Kolkin was the owner of the premises, were you requested by any other official not to take action with regard to the zoning violations? [lines 10-13, page 19].
>
> Question: Mr. Linden, were you paid any sum of money or property or favor as to not take any action of these violations? [lines 18-20, page 19].
>
> Question: Were you promised any money or other consideration for not taking any action for these violations? [line 25, page 19 through line 2 page 20].
>
> Question: Do you know any other person or building inspector or public official that was party to or exercised or made arrangement for payment of money given for property or the exchange of a favor regarding the subject premises? [lines 4-8, page 20].

> Question: Did Mr. Kolkin offer you money for not taking action with respect to the violation? [lines 11-12, page 20].

To all these questions the answer was the same, to wit:

> MISTER WEINBLATT [LINDEN'S ATTORNEY] Note my same objection. And reserve your right of the Constitution and the Fifth Amendment on the grounds that you might incriminate yourself. [lines 21-24, page 19].

If, therefore, there was any deviousness or impropriety, or as stated on page 7 of Appellees Brief, an apparant conspiracy, a trial on this issue will establish that such term more appropriately applies to the actions of the Appellee.

The Defendants-Appellees have set forth nothing which can be construed to warrant a finding and holding that Plaintiffs-Appellants should be subjected to the unnecessary hardship and unreasonable deprivation of the use of their property that would result from the summary revocation of their "three-family Certificate of Occupancy." Further, in light of all the equitable considerations of this case, it cannot be said, as it must if Appellees are to be successful, that even admitting the truth of the Appellants well pleaded obligations, their sufficiency can be denied as a matter of law.

POINT I

THE DISTRICT COURT DECISION DID NOT TERMINATE THIS ACTION ON THE CAUSES NOT DECIDED.

Plaintiffs' Complaint alleges seven Causes of Action which may be summarized as follows:

(a) Plaintiff's first and second cause alleges a taking of Plaintiffs' property without due process of law, pursuant to the Fifth and Fourteenth Amendments of the United States Constitution.

(b) Plaintiffs' third cause alleges that the defendants prevented the Plaintiffs from contracting in violation of Article 1, Section 10, of the Federal Constitution.

(c) Plaintiffs' fourth cause alleges defendants interference with Plaintiffs' right to lease, hold, and convey real property in controvention of the provisions of 42 U.S.C., Section 1982.

(d) Plaintiffs' fifth cause alleges the violations of Plaintiffs' rights as set forth in 42 U.S.C., Section 1983.

(e) Plaintiffs' sixth cause alleges Fourth Amendment violations due to Defendants unreasonable and continuous harrassment.

(f) Plaintiffs' seventh cause alleges a cause of action in defamation, interference with Plaintiffs' utilization of their property, as well as threats of criminal sanctions.

Justice Bruchhausen, in writing for the District Court concluded that Plaintiffs' Complaint fails to state a claim for relief pursuant to 42 U.S.C., 1983. This however, was a determination of but one of Plaintiffs' multiple claims.

Plaintiffs' Complaint set forth seven separate causes of action. These causes of action, although, stemming from certain similar transactions, are by no means duplicative, but rather, complimentary. Plaintiffs have, pursuant to proper federal procedure, included all their cause of actions into one Complaint. Rule 8(e)(2). To do otherwise, raises serious questions as to res adjudicata as well as questions of splitting causes of action. See 1B Moore's Federal Practice, Splitting a Cause of Action, ¶0.410[2], Page 1163, et. seq., generally.

Since Plaintiffs' Complaint raises seven complimentary causes of action, the jurisdictional bases raised are characteristic to each Cause of Action. Taken in this context, Judge Bruchhausen's statement, as cited on page 2 of Defendants-Appellees Brief, that:

> This Action is brought pursuant to the Civil Rights Act, 42 U.S.C., 1982, and 1983, Article 1, Section 10, the 4th, 5th and 14th Amendments of the Federal Constitution.

is therefore only but a recapitulation of the various jurisdictional bases which support the various complimentary causes of action set forth in Plaintiffs' Complaint, and no more.

POINT II

SUBSTANTIVE ALLEGATIONS OF THE COMPLAINT ARE TO BE TAKEN AS TRUE.

For purposes of Pretrial Motions, the substantive allegations of the Complaint are to be taken as true. U.S. v. Watchmakers of Switzerland Information Center, Inc., 135 F Supp. 40 (S.D.N.Y. 1955). Plaintiffs' Complaint, at paragraph 37, states that numerous residences within the city of Long Beach are in actual violation of the zoning ordinances of the City of Long Beach, and at paragraph 38, that the defendants have not attempted to revoke any existing Certificate of Occupancy of persons simularly situated except for Plaintiffs'.

42 U.S.C., Section 1982 provides that:

> All Citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.

Clearly, the Federal Courts have power to fashion unique and effective equitable remedies for the enforcement of this Section. Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969). Likewise, the fact that this Section governing property rights of citizens is couched in declaratory terms, and provides no explicit method of enforcement, does not prevent a Federal Court from fashioning effective equitable remedies. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968).

Taking Plaintiffs' allegations as true, as the District Court must in determining Pretrial motions, the District Court failed to recognize, much less pass upon this Cause in Plaintiffs' Complaint.

In that such substantive allegations can be more properly determined at trial, the District Court summary disposition of this Action must be reversed.

POINT III

PLAINTIFF HAS PROPERLY STATED A CAUSE OF ACTION PURSUANT TO 42 USC SECTION 1983.

As more fully set forth in Point 4 of the Brief for Plaintiffs-Appellants, a Cause of Action against an individual and not a municipal corporation is not precluded by

Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). Here, a Cause of Action is alleged against a municipal corporation and individuals. Plaintiffs have brought this Action against Arthur Zimmerman, David Linden, Al Smith and George Tripani, as well as the City of Long Beach. As individuals, these Defendants, unlike municipal corporations, are not immune from prosecution under 42 U.S.C., Section 1983. Citizens Committee for Faraday Wood v. Lindsay, 362 F. Supp. 651 (S.D.N.Y. 1973).

(a) PLAINTIFFS' ACTION SEEKS OTHER THAN PROTECTION OF PROPERTY OR MONETARY RIGHTS.

In its opinion, the District Court reduced the Plaintiffs' Cause of Action to one seeking vindication solely of an alleged infringement of a property right, i.e. the alleged unlawful revocation of the Certificate of Occupancy. [Decision of J. Bruchhausen, page 6]. Building upon this foundation, the District Court then held that the loss of freedom was dependent upon the infringement of the property right and therefore not within the jurisdiction of Section 1983. Cited for this proposition was Howard Higgins, 379 F. 2d 227, 228 (10th Cir. 1967); McManigal v. Simon, 382 F. 2d 408, 410 (7th Cir. 1967); Ream v. Handley, 359 F. 2d 728, 731 (7th

Cir. 1966); and Abernathy v. Carpenter, 208 F. Supp. 793 (W. D. Mo. 1962), affirmed 373 U.S. 241, 83 S. Ct. 1295, 10 L. Ed. 2d 409 (1903).

On the outset, it is to be noted that the Howard, McManigal, and Ream cases involve situations where Plaintiffs sought only to protect property or monetary rights. Howard was an action for personal property while Claimant was in Sheriff's custody; McManigal was a case involving a corporate dispute as to whether or not to make a certain donation and Ream was a case involving slander of title. The point relied upon in deciding in all three of these cases was that the Civil Rights Statutes, of which Section 1983 is one, do not confer jurisdiction where a person seeks only to protect property or monetary rights. Ream v. Handley, 359 F. 2d 728, 731 (7th Circuit 1966).

Further, while Abernathy, presented a somewhat more complex question, to wit, the application of state income tax to certain non-residents, the Court following the Supreme Court in Hague v. CIO, 307 US 496, 59 S. Ct. 954, 83 L. Ed. 1028 (1939) stated:

> The conclusion seems inescapable that the right conferred by the [predecessor of the current Civil Rights Act] to maintain a suit in equity in the Federal Courts to protect a suitor against deprivation of rights or immunities secured

> by the constitution, has been preserved, and that whenever the right or immunity is one of personal liberty ... there is jurisdiction in the District Court ... without proof [of jurisdictional amount]. 307 U.S., at 531, 59 S. Ct., 971 83 L. Ed. at 1445.

At bar, Plaintiff alleges Causes of Action other than to merely protect their property or monetary rights. Plaintiffs' Third Cause of Action alleges a violation of their rights under Article 1, Section 10 of the Constitution of the United States. Plaintiff sixth Cause of Action al eges Fourth Amendment violations due to unreasonable search and continuous harrassment. Plaintiffs' Seventh Cause of Action alleges threats of criminal sanction made by the Defendants.

(b) PLAINTIFFS AND APPELLANTS MUST NOT BE DEPRIVED OF THEIR RIGHT TO BE HEARD.

As heretobefore stated, Plaintiff need not prove his case on the merits at this preliminary stage. In granting summary judgment at this stage of the proceeding, the District Court denied Plaintiffs their right to a trial by jury as to their other causes of action. As stated in Sartor v. Arkansas Gas Corp., 321 U.S. 620, 627, 64 S. Ct. 724, 729, 88 L. Ed. 967 (1944):

> In the very proper endeavor to terminate a litigation before it

> ... [the District Court] overlooked considerations which make the summary judgment an inappropriate means to that very desirable end.

Summary judgment may only be properly entered where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Progress Development Corporation v. Mitchell, 286 F. 2d 222, 234 (7th Cir. 1961). That is not this case. Summary judgment cannot be invoked to deprive litigants of their right to trial if there remain genuine issues of material fact to be tried. Hartford Accident and Indemnity Company v. Northwest National Bank of Chicago, 228 F. 2d 391, 395 (7th Cir. 1955).

The District Court erred in dismissing Plaintiffs' Complaint, by passing on the merits of the case at this preliminary stage of the action.

This case involves individual claims as well as claims involving property rights. Assuming arguendo that 42 U.S.C. Section 1983 precludes Plaintiffs from litigating the infringement of their property rights, said statute does not preclude the litigation of their individual claims. Plaintiffs' Complaint alleges a denial of personal rights, to include discrimanatory treatment as alleged in paragraphs 36, 37 and 38 of Plaintiffs' Complaint. These are not precluded by Section 1983.

POINT IV

THE DISTRICT COURT ORDER IS NOT DISPOSITIVE OF PLAINTIFFS' ACTION UNDER RULE 54 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 54 of the Federal Rules of Civil Procedure provides:

> (b) JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.
>
> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third-party claim, or when multiple parties are involved, the Court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon the express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgement adjudicating all the claims and the rights and liabilities of all the parties.

The District Court order in this case has adjudicated fewer than all the claims in this action, and therefore, at best, does not terminate the action as to any such claim not so adjudicated. Therefore, under the decision rendered by the District Court it is procedurely impossible to dismiss Plaintiffs Action as to the unadjudicated claims.

The Court has a duty to grant the relief which facts before it require, and the Court is under an obligation to consider all the legal theories the parties suggest although it is not confined to only those theories. Nagler v. Admiral Corp., 248 F. 2d 319 (2d Cir. 1957). Hence, although it is desirable to urge upon the District Court the legal theories upon which a party claims decision, it is the Court's responsibility to award the relief required by the facts on any proper ground, regardless of the theories urged by the parties. Massachusettes Bonding and Insurance Co. v. State of New York, 259 F. 2d 33 (2d Cir. 1958). Although a Federal Court is not limited by the particular relief sought in the Complaint, Publishers Association of New York City v. New York Newspaper Printing Pressman's Union Number Two, 246 F. Supp. 293 (S.D.N.Y. 1965), where a Plaintiff has stated a cause of action for any relief, the Court must grant him the relief to which he is entitled under the facts pleaded, and it is immaterial what he designates the cause of action or what he asked for in his prayer for relief. Kansas City S.D.L. & C.R. Co. v. Alton R. Co., 124 F. 2d 780 (7th Cir. 1941).

Therefore, even assuming arguendo that the Complaint fails to state a claim for relief pursuant to 42 USC 1983,

it cannot be said as a matter of law, that Plaintiff has failed to state a cause of action for which relief can be granted.

POINT V

AN OPPORTUNITY FOR A HEARING IS AN ESSENTIAL ELEMENT OF DUE PROCESS.

The Defendants-Appellees, claim that pursuant to the Zoning Ordinance of the City of Long Beach, the Commissioner of Buildings has the power to revoke any permit, and that the Building Commissioners and Inspectors in this case acted wholly within the scope of their official duties and their responsibilities. In Exhibit "M2" Defendants-Appellees Brief, to wit, a letter dated December 24, 1970 addressed to Plaintiffs from Defendant Linden, it is provided:

> This will serve to advise you that as Building Commissioner and Director of Property Conservation, I hereby revoke and recall the said C. O. #A-811 issued on April 25, 1952. (Emphasis added).

It is this unilateral action on the part of Defendant Linden, without the benefit of a hearing, that Plaintiffs contest as being a deprivation of their due process rights.

An opportunity for a hearing is one of the essential elements of due process. Shields v. Utah Idaho Central

Railroad Co., 305 US 177, 59 S. Ct. 160, 83 L. Ed. 111 (1939). This is especially true where, as here, such a hearing is necessary for the protection of the parties. Turpin v. Lemon, 187 US 51, 23 S. Ct. 20, 47 L. Ed. 70 (1902). Hence, due process as applied to legislation, generally involves the opportunity for a hearing. 16 Am. Jur. 2d Constitutional Law, Section 569, p. 972, Footnote 1.

It was a maxim of the common law that no man should be punished without the opportunity of being heard. Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1896). Hence, no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal where he may contest the claim set up against him, and be allowed to meet it on the law and facts. Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 25 S. Ct. 474, 49 L. Ed. 836 (1904). A forteiture without notice to the owner of real property and without opportunity of being heard on the question amounts to a denial of due process of law. 16 Am. Jur. 2d Supra, at page 973, footnote 4.

The required hearing is a matter of right, and where such right to a hearing is denied, the mere giving of a notice is ineffectual for any purpose within the meaning of the Constitutional guarantee. The denial to a party of the right

to appear is in legal effect to recall the notice served upon him. Windsor v. McVeigh, 93 U.S. 274, 23 L. Ed. 914 (1876).

At bar, Plaintiffs-Appellants have been denied their right to a hearing on the revocation of their 3-family Certificate of Occupancy. If Defendants-Appellees argued that such deprivation of a hearing is permissible pursuant to the Zoning Ordinances of the City of Long Beach, then so much of said provision that denies the right to be heard at a hearing, and permits unilateral revocation of a Certificate of Occupancy must be deemed unconstitutional.

POINT VI

A COURT HAS INHERENT POWER TO DO EQUITY IN AN INEQUITABLE ACTION.

In the terms of Aristotle, equity is "the correction of that wherein the law by reason of its universality is deficient." United States v. Certain Land in City of St. Louis, Missouri, 29 F. Supp. 92, 97 (E.D. Mo. 1939). Or, as expressed by Blackstone, "In its true meaning, equity is the soul and spirit of the law; positive law is construed and rational law is made by it. In this, equity is synonomous with justice, that is, in the true sense of the rule. The terms, courts of equity and courts of law, might mislead us, as if one judged

without equity, and the other judged without law. Such a distinction is erroneous." Gavit, Blackstone's Commentaries on the Law, page 730 (Washington Law Book Co. 1941).

Likewise, it has been held that courts are vested with such inherent power as is necessary for the proper and complete administration of justice, and that such is resident in all courts of superior jurisdiction and essencial to their existance. Application of Burge, 203 Misc. 77, 118 N.Y. S. 2d 23, 29, (Supreme Court New York County 1952) reversed 282 App. Div. 219, 122 N.Y.S. 2d 232 (1st Dept. 1953), Appellate Division reversed and Supreme Court opinion affirmed 306 N.Y. 811, 118 N.E. 2d 822 (1954).

At bar, Defendants-Appellees argue that even though a three-family Certificate of Occupancy (Appellees Exhibit "G") was obtained some twenty-two years ago from the proper municipal officer, by proper means, that a municipality cannot be now estopped from enforceing its zoning laws due to laches. As has been aptly set forth by Judge Cardozo,

> Few formulas are so absolute as not to bend before the blast of extraordinary circumstances.

[Shientag, Moulders of Legal Thought, Viking Press., 1943, page 86 (Reviewing the Writings and Opinions of Judge Cardozo)].

The expression of such reasoning has given rise to an equitable doctrine in the area of zoning law that has become known as "Special Facts Exception" This doctrine has developed in the areas of zoning variances and vested rights, Dubow v. Ross, 254 App. Div. 706, 3 N.Y.S. 2d 862 (2d Dept. 1938); Golisano v. Town Board of Macedon, 31 A.D. 2d 85, 296 N.Y.S. 2d 623 (4th Dept. 1968), relying on 3 University of San Francisco Law Review, pp. 124, 136-137; and Matter of Jayne Estates v. Raynor, 22 N.Y. 2d 417, 293 N.Y.S. 2d 75, 239 N.E. 2d 713 (1968). The doctrine was developed to avoid unjust results caused by the strict application of unflexible zoning laws.

Paralleling the rights acquired by a home owner under a Certificate of Occupancy to rights acquired under a variance or change in zone, a line of reasoning can be developed and followed to a logical conclusion in this case. There is authority holding that irrespective of "vested rights" acquired, a new zoning ordinance could not be applied to cancel a previously issued permit where under the special circumstances presented, to hold otherwise would be an unjust, absurd, confiscatory and oppressive result. See, Annot. -- Zoning Ordinance - Retroactive Effect, [c] General Equitable Considerations Favoring Permittee, 49 A.L.R. 3rd 13, 64. It is granted that there has not been a change in the law

in the case at bar, but a change in the policy in the City of Long Beach after a twenty-two year period may be said to have the effect of a change in law.

(a) AUTHORITY IN OTHER JURISDICTIONS.

The "Special Circumstances Doctrine" has been accepted by various state jurisdictions to remedy unreasonable deprivation of the use of property. Where a Permittee, had engaged an architect to prepare plans for the building and employed a building contractor to erect the building, and made arrangements with a bank to finance the construction, all in good faith and in reliance upon the permit issued, it was held by a Missouri court in Krekeler v. St. Louis County Board of Zoning Adjustment, 422 S.W. 2d 265 (Mo. Sup. Ct. 1967), that whether or not the permittee acquired vested rights in the permit by virtue of these circumstances, these facts would warrant a finding and holding that to revoke the permit would constitute an unnecessary hardship and unreasonable deprivation of use of property. See, Annot., Zoning Ordinance - Retroactive Effect, supra, 49 A.L.R. 3rd, at 64.

Likewise, in Friedman v. Hague, 106 N.J.L. 137, 147 Atl. 553 (New Jersey Court of Errors and Appeals, 1927), an application was made to the Board of Commissioners for a permit

to erect a garage. At a subsequent hearing, the Board passed a resolution revoking the permit, citing as their reason that the permit was in violation of a Zoning Ordinance making it illegal to construct a garage within 150 feet of a church and also that the permit was granted without the requisite public hearing. The Court of Errors and Appeals reversed the Board of Commissioners' decision and stated.

> But even it it be assumed that the Board of Commissioners has improperly or erroneously recommended the granting of the Permit, nevertheless, we are clearly of the view that the Board was without lawful power to revoke such permit, after the prosecutrix had acted upon the faith of it, by the expenditure of monies in the prosecution of the work, and had entered into contractural relations with builders for the erection of a garage, unless it appeared that such permit was obtained by fraud or deceit. 147 Atl., at 554.

Likewise, where permittee has acted in good faith upon the belief that a permit for the making of alterations issued by the proper authorities was valid and effective, and the issuing authority waited until substantial demolition had taken place in reliance upon the permit before revoking it, justice would prevent the revocation of the permit in the absence of fraud or misrepresentation. Kornylak v. Hague,

8 N.J. Mis. R. 481, 150 Atl. 669 (Sup. Ct. of N. J. 1930); Pabst v. Ferner, 8 N.J. Mis. R 621, 151 Atl. 368 (Sup. Ct. of N.J. 1930), Tim v. City of Long Branch, 134 N.J.L. 285, 47 A. 2d 4 (Sup. Ct. of N.J. 1946), affirmed 135 N.J.L. 549, 53 A. 2d 165 (1946).

(b) TEXTBOOK TREATMENT OF THE DOCTRINE.

As standard reference on zoning, E.M. Bassett, Zoning (Russell Sage Foundation, 1936), strongly advocates the soundness of the "Special Facts Exception." In discussing its applicability it is stated:

> Where a building department issues a permit for a non-conforming building and construction has proceeded and no appeal to the Board of Appeals has been taken by neighbors, the permit will not be revoked.
> E.M. Bassett, Zoning, supra., at page 106.

Again, it is pointed out to this Court that in excess of twenty-two years has elapsed since the issuance of the three-family Certificate of Occupancy and the house has been operated in relaince upon such Certificate as well as a sale has been founded upon such Certificate.

(c) NEW YORK RECOGNITION OF THE DOCTRINE.

In addition to the cases above cited, several New York opinions have recognized that rights may be gained even under an invalidly granted permit and have considered whether the Applicant under the particular facts of the case has substantially changed his position. In Jayne Estates, Inc. v. Merritt, N.O.R., 210 N.Y.S. 2d 252 (Sup. Ct. Suffolk Co. 1960) the lower court in its opinion noted the equity possibilities presented by the facts must be considered:

> Further, I note the Appellate Division, Second Department has in recent years mentioned the Decision [Dubow v. Ross, 254 App. Div. 706, 3 N.Y.S. 2d 862] with some approval, indicating it still represents a vital legal theory (Suffolk Pines Inc., v. Harwood, 10 App. Div. 2d 758, 160 N.Y.S. 2d 83). There is some indication that signifigance may be yet to Mr. Justice Colden's word in Atlas v. Dick, when he stated [192 Misc. 843, 81 N.Y.S. 2d 129]:
>
> * * *This rule stems from the root of fair play which revolts at the notion permitting one party to change the rules of the game when play is in progress. It would be manifestly unjust to let public officials, no matter how well intentioned, to use their office to withhold petitioner his legal rights while they change their ordinances so as to deprive him of those rights permanently.
>
> 210 N.Y.S. 2d, at 255.

In Jayne Estates, Inc. v. Raynor, 28 App. Div. 2d 720, 281 N.Y.S. 2d 644 (2d Dept. 1967), it was held:

> It is true Appellant obtained no vested right under the illegally issued Building Permit despite the extent of the improvements made in reliance thereon. However, under the particular facts disclosed by this record, we find that the plight of the Appellant is due to unique circumstances and not to general conditions in the neighborhood.
>
> 281 N.Y.S. 2d, at 646.

In the case at bar, it is clear that the Court is bound to consider the facts and circumstances relating to the revocation of Plaintiffs-Appellants' three family Certificate of Occupancy and to consider the special facts of this case to equitably protect Plaintiffs-Appellants from undue financial loss where there is no corresponding benefit either at law or in equity to sustaining such revocation of Plaintiff-Appellants Certificate of Occupancy.

CONCLUSION

The Order of Justice Bruchhausen, dismissing all seven (7) Causes of Action of Plaintiffs' Complaint must be reversed in all aspects and the Complaint in the interest of justice, reinstated.

Respectfully submitted,

ZANE and ZANE
Attorneys for Plaintiffs-Appellants
One Rockefeller Plaza
New York, New York 10020
(212) 245-2222

James B. Zane
Martin E. Fiel
Of Counsel.

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-2069

LAWRENCE WALSH and LORETTA WALSH

Plaintiffs-Appellants

v.

THE CITY OF LONG BEACH, ARTHUR ZIMMERMAN, DAVID LINDEN, AL SMITH and GEORGE TRIPANI

Defendants-Appe;;ees

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 24th day of February, 1975, deponent served the within Reply Brief for the Plaintiffs-Appellants upon Morris H. Schneider, Corporation Council, City of Long Beach One Wsst Chester Street Long Beach, N.Y. 11561

Attorney(s) for the Appellees in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 24th day of February 1975

Harold Silberzweig

HAROLD SILBERZWEIG
Notary Public State of New York
No. 30-8995450
Qualified in Nassau County
Commission Expires March 30, 1976